Nos. 80-11 and 80-15

In the Supreme Court of the United States

OCTOBER TERM, 1980

J. GREGORY MERRION & ROBERT L. BAYLESS, d/b/a MERRION AND BAYLESS, et al.,
Petitioners,

v.

JICARILLA APACHE TRIBE, et al.,
Respondents,

AMOCO PRODUCTION COMPANY AND MARATHON OIL COMPANY,
Petitioners,

v.

JICARILLA APACHE TRIBE, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF MOUNTAIN STATES LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

and

BRIEF OF THE MOUNTAIN STATES LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

JAMES G. WATT
WILLIAM H. MELLOR III
R. NORMAN CRAMER JR.
Mountain States Legal Foundation
1200 Lincoln — Suite 600
Denver, Colorado 80203
Telephone: (303) 861-0244
Attorneys for the Amicus Curiae

Nos. 80-11 and 80-15

In the Supreme Court of the United States

OCTOBER TERM, 1980

J. GREGORY MERRION & ROBERT L. BAYLESS, d/b/a MERRION AND BAYLESS, et al.,
Petitioners,

v.

JICARILLA APACHE TRIBE, et al.,
Respondents,

AMOCO PRODUCTION COMPANY AND MARATHON OIL COMPANY,
Petitioners,

v.

JICARILLA APACHE TRIBE, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF MOUNTAIN STATES LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

Mountain States Legal Foundation respectfully moves this Court, pursuant to Rule 42 of the Rules of the United States Supreme Court, for leave to file the annexed brief *amicus curiae*. In support of this motion, the Foundation states:

1. Mountain States Legal Foundation (the Foundation), is a nonprofit, membership public interest legal foundation. The Foundation is supported entirely by donations from its members and is dedicated to the legal advoca-

cy of the values and concepts of individual liberties and economic freedom. The Foundation takes an interest in questions of law having a national scope and especially those that have a direct impact in the Mountain States region, including the State of New Mexico where the instant case arose.

2. The issue invoked in this case — the nature and extent of Indian tribal sovereignty over nonmembers of the tribe — has far-reaching ramifications for all nonmembers who engage in on-reservation activities. Recent decisions of this Court have partially addressed, but left unresolved this critical issue. An examination of these far-reaching ramifications is crucial to a well-reasoned explication of the tribes' sovereign power. As *amicus curiae,* the Foundation seeks to bring before this Court fundamental considerations which form the basis of individual liberties and that underscore the need for clarification of the nature and extent of Indian tribal sovereignty.

3. These considerations, while directly applicable to the instant case, transcend the specific interests of the parties hereto and thus may not be adequately addressed by the existing parties.

For the foregoing reasons, Mountain States Legal Foundation respectfully requests that its motion for leave to file the annexed brief *amicus curiae*, be granted.

Dated this 20th day of November, 1980.

James G. Watt

William H. Mellor, III

R. Norman Cramer Jr.
Mountain States Legal Foundation
1200 Lincoln — Suite 600
Denver, Colorado 80203
Telephone: (303) 861-0244
Attorneys for the Amicus Curiae

Nos. 80-11 and 80-15

In the Supreme Court of the United States

OCTOBER TERM, 1980

J. GREGORY MERRION & ROBERT L. BAYLESS, d/b/a MERRION AND BAYLESS, et al.,

Petitioners,

v.

JICARILLA APACHE TRIBE, et al.,

Respondents,

AMOCO PRODUCTION COMPANY AND MARATHON OIL COMPANY,

Petitioners,

v.

JICARILLA APACHE TRIBE, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE MOUNTAIN STATES LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS 2

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. STATEMENTS BY THIS COURT REGARDING THE NATURE AND EXTENT OF INDIAN TRIBAL SOVEREIGNTY ARE INCONSISTENT AND CONTRADICTORY 3

II. THE CONCEPT OF REPRESENTATIVE GOVERNMENT PRECLUDES UNFETTERED TRIBAL JURISDICTION OVER NONMEMBERS OF THE TRIBE 10

III. ALLOWING A TRIBE TO FUNDAMENTALLY CHANGE ITS VOLUNTARY OBLIGATIONS UNDER A CONTRACT THROUGH THE INSTITUTION OF A "TAX" VIOLATES FREEDOM OF CONTRACT 14

IV. ALLOWING THIS TYPE OF TRIBAL TAXATION IS INCONSISTENT WITH THE OVERRIDING FEDERAL INTEREST IN ESTABLISHING A NATIONAL ENERGY POLICY 17

CONCLUSION 19

CERTIFICATE OF SERVICE 21

TABLE OF AUTHORITIES

Page

CASES CITED

Avery v. Midland County, 390 U.S. 474 (1968) 11

Berry v. Arapahoe and Shoshone Tribes, 420 F. Supp. 934 (D. Wyo. 1976) 16

Board of Regents v. Roth, 408 U.S. 564 (1972) 15, 16

Buster v. Wright, 135 F. 947 (8th Cir. 1905) 6, 8

The Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) 3, 4

City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970) 11

Conoco, Inc. v. Shoshone and Arapahoe Tribes, No. L. 80-0181 (D. Wyo., filed June 23, 1980) 19

Dodge v. Nakai, 298 F. Supp. 17 (D. Ariz. 1968) 15

Ex Parte Young, 209 U.S. 123 (1908) 13

Groundhog v. Keeler, 442 F.2d 674 (10th Cir. 1971) 15

Hadley v. Junior College District of Metropolitan Kansas City, 397 U.S. 50 (1970) 11

Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir. 1956) 6, 8

Jicarilla Apache Tribe v. Supron Energy Corp., 479 F. Supp. 536 (D.N.M. 1979) 16

Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 1 (1823) 3, 4

Jones v. Meehan, 175 U.S. 1 (1899) 5

Kramer v. Union Free School District, 395 U.S. 621 (1969) 11

Merrion v. Jicarilla Apache Tribe, 617 F.2d 537 (10th Cir. 1980) 6, 15

Meyer v. Nebraska, 262 U.S. 390 (1923) 16

Morris v. Hitchcock, 194 U.S. 384 (1904) 6, 7, 8

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) 4, 5, 7, 9, 14, 15, 17

	Page
Perry v. Sindermann, 408 U.S. 593 (1972)	16
Puyallup Tribe v. Washington Department of Game, 433 U.S. 165 (1977)	12, 13
Reynolds v. Sims, 377 U.S. 533 (1964)	11, 13, 14
Roff v. Burney, 168 U.S. 218 (1897)	5, 12
Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)	12, 13, 15, 16
Talton v. Mayes, 163 U.S. 376 (1896)	15
Turner v. United States, 248 U.S. 354 (1919)	12
United States ex rel. Mackey v. Coxe, 59 U.S. (18 How.) 100 (1855)	5
United States v. Kagama, 118 U.S. 375 (1886)	4, 12
United States v. Quiver, 241 U.S. 602 (1916)	5
United States v. United States Fidelity & Guaranty Co., 309 U.S. 506 (1940)	12
United States v. Wheeler, 435 U.S. 313 (1978)	5, 9
Washington v. Confederated Tribes of the Colville Indian Reservation, ... U.S. ....., 100 S.Ct. 2069 (1980)	2, 5, 7, 8, 9, 17
Wesberry v. Sanders, 376 U.S. 1 (1964)	11
William v. Lee, 358 U.S. 217 (1959)	5

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, §§ 1, 2	11
U.S. Const. art. I, § 8, cl. 3	4
U.S. Const. art. I, § 10, cl. 1	15
U.S. Const. amend. XV	11
U.S. Const. amend. XVII	11
U.S. Const. amend. XIX	11
U.S. Const. amend. XXIV	11
U.S. Const. amend. XXVI	11

Page

STATUTES

8 U.S.C. § 1401(b) 4
25 U.S.C. § 71 4
25 U.S.C. § 476 8
25 U.S.C. §§ 1301-1303 ..... 13, 15
25 U.S.C. § 1301(2) 15
25 U.S.C. § 1302(3) 15
25 U.S.C. § 1302(4) 15
25 U.S.C. § 1302(6) 15
25 U.S.C. § 1302(8) 15
25 U.S.C. § 1302(10) 15
42 U.S.C. §§ 5901-5917 17
42 U.S.C. §§ 6201-6214 17
42 U.S.C. §§ 6831-6840 17
42 U.S.C. §§ 6851-6892 17
42 U.S.C. § 7111 18
42 U.S.C. § 7111 (1-2) 18

OTHER

Final Report of the American Indian Policy Review Commission (1977) 18, 19

State of the Union Address, January 23, 1980, 1 U.S. Code Cong. & Ad. News 135 (March 1980) 18

S. Brakel, *American Indian Tribal Courts The Costs of Separate Justice* (1978) 16

INTEREST OF AMICUS

Mountain States Legal Foundation (the Foundation) is a nonprofit, membership public interest legal foundation. The Foundation is supported entirely by donations from its members and is dedicated to the legal advocacy of the values and concepts of individual liberties and economic freedom. As *amicus curiae,* the Foundation seeks to bring before this Court fundamental considerations which form the basis of individual liberties and that underscore the need for clarification of the nature and extent of Indian tribal sovereignty. These considerations, while directly applicable to the instant case, transcend the specific interests of the parties hereto and thus may not be adequately addressed by the existing parties.

SUMMARY OF ARGUMENT

Recent decisions of this Court, especially *Washington v. Confederated Tribes of the Colville Indian Reservation,* ..... U.S. ....., 100 S.Ct. 2069 (1980), have partially addressed, but left unresolved important issues which impact all nontribal members who engage in on-reservation activities. These issues arise from statements by this Court that impute a degree of sovereignty to Indian tribes which, if carried to their logical extreme, will effectively create separate enclaves within this country that exercise all but a few of the attributes of statehood, but without the traditional safeguards to protect individuals from governmental excesses. Consequently, there is a need for clarification by this Court of the exact nature and extent of sovereignty that Indian tribes possess.

The instant case affords an excellent opportunity to establish safeguards and clarify this confusing and contradictory area of the law. It involves a unilateral modification of a contract via taxation which the Tenth Circuit upheld as a valid exercise of inherent sovereignty. If, as an attribute of inherent sovereign power, the tribes are allowed to im-

pose such taxes directly upon nonmembers, the federal interest of ensuring representative government is implicated. Said implication occurs due to the fact that nonmembers do not have, and generally cannot obtain, any voice in tribal government. This case also underscores the conflict between the broad sovereignty claimed by the Jicarilla Apache Tribe and freedom of contract. The ordinance in question drastically alters the preexisting contractual rights and obligations between the tribe and petitioners and thereby violates the liberty and property interests of the petitioners. Finally, this Court must consider whether the type of energy development taxation imposed by the Jicarilla Apache Tribe is compatible with the congressionally mandated national energy policy. The relationship between Indian tribal sovereignty and each of these overriding federal interests will be explored in detail after an examination of the existing contradictory nature of the Indian tribes' sovereignty.

ARGUMENT

I. STATEMENTS BY THIS COURT REGARDING THE NATURE AND EXTENT OF INDIAN TRIBAL SOVEREIGNTY ARE INCONSISTENT AND CONTRADICTORY

Originally, the Indian tribes were truly sovereign nations. However, as the settling of this continent progressed, any claim to absolute sovereignty was extinguished by discovery, conquest, and cession. *The Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1 (1831); *Johnson v. M'Intosh,* 21 U.S. (8 Wheat.) 543 (1823). Consistent with this process of discovery and conquest is the conclusion that the tribes ceased to be regarded by the United States as foreign nations. The fact that the Indian tribes are not foreign nations is evidenced by the separate delineation in the Commerce Clause which empowers Congress "[t]o regulate commerce *with foreign nations,* and among the several States, *and*

with the Indian tribes." U.S. Const. art. I, § 8, cl. 3 (emphasis added). Even though the tribes were not considered foreign nations, they were, however, separate entities dealt with by Congress through the treaty power until 1871. *See* Act of March 3, 1871, 25 U.S.C. § 71 (1976).

By the end of the nineteenth century, this Court characterized the status of the Indian tribes in the following manner:

> [T]hese Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the Government of the United States, or of the States of the Union. *There exists within the broad domain of sovereignty but these two.* There may be cities, counties, and other organized bodies with limited legislative functions, but they are all derived from, or exist in, subordination to one or the other of these. (emphasis added).

United States v. Kagama, 118 U.S. 375, 379 (1886). Thus, the tribes have not been equated with sovereign nations *per se.* This less-than-sovereign status is underscored by the tribes' inability either to dispose of their own land without the United States' approval or to enter into any type of relations with foreign powers. *See, The Cherokee Nation v. Georgia, supra; Johnson v. M'Intosh, supra.* Such quasi-sovereignty was further diluted by the Act of June 2, 1925, *recodified at* 8 U.S.C. § 1401 (b) (Supp. III 1979), which made all Indians citizens of the United States.

Consistent with these historical pronouncements is this Court's recent characterization of the nature of tribal sovereignty in *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1978):

> [T]he tribe's retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments. As the Court of Appeals

> recognized, Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress *and* those powers *"inconsisent with their [dependent] status."* (emphasis in original).

Id. at 208 (quoting *Oliphant v. Schlie,* 544 F.2d 1007, 1009 (9th Cir. 1976)). Additionally, the "inconsistent with their status" component of this potential limitation was interpreted in *Washington v. Confederated Tribes of the Colville Indian Reservation,* 100 S.Ct. at 2081, to encompass actions which are at odds with an overriding federal interest. Therefore, the tribes are indeed very limited in the type of sovereignty that they can claim.

One aspect of sovereignty which the tribes consistently have been allowed to exercise is that of self-rule. *E.g., United States v. Wheeler,* 435 U.S. 313 (1978) (allowing the tribes to exercise criminal jurisdiction over tribal members concerning crimes on reservation land); *Williams v. Lee,* 358 U.S. 217 (1959) (allowing the tribes to enforce tribal law in their own courts); *United States v. Quiver,* 241 U.S. 602 (1916) (allowing the tribes to regulate domestic relations among tribal members); *Jones v. Meehan,* 175 U.S. 1 (1899) (allowing the tribes to prescribe rules for inheritance of property); *Roff v. Burney,* 168 U.S. 218 (1897) and *United States ex rel. Mackey v. Coxe,* 59 U.S. (18 How.) 100 (1855) (allowing the tribes the power to determine tribal membership). This inward-looking sovereignty is quite consistent with the dependent status of the tribes *vis-a-vis* the United States Government. By permitting this degree of self-governing sovereignty, the tribes have retained their separate cultural existence, complete with their own customs, language, and heritage.

However, there does exist a line of authority, cited by this Court in *Colville,* 100 S.Ct. at 2081, which arguably extends a tribe's sovereignty beyond the self-governing type

of sovereignty as discussed above to encompass broad authority to tax nonmembers of the tribe. *Morris v. Hitchcock,* 194 U.S. 384 (1904); *Iron Crow v. Oglala Sioux Tribe,* 231 F.2d 89 (8th Cir. 1956); *Buster v. Wright,* 135 F. 947 (8th Cir. 1905), *appeal dismissed,* 203 U.S. 599 (1906). The Tenth Circuit's opinion below relied upon, and indeed expanded, these cases in upholding the Jicarilla tribal ordinance. 617 F.2d 537, 543-44 (10th Cir. 1980). In so doing, the Tenth Circuit recognized that the proper characterization of these cases has been a matter of some dispute. *Id.* at 543. Therefore, a brief discussion of these ambiguous holdings will highlight the need for clarification of the nature and extent of inherent tribal power to tax.

In *Buster,* non-Indians with businesses on the Creek Reservation brought suit against a variety of federal and tribal officials to enjoin them from reporting plaintiffs for deportation from the Indian territory unless plaintiffs paid taxes as prescribed by the law of the Creeks for the privilege of doing business within the Creek Nation. The court noted in passing that the "tax" at issue in *Buster* was actually more in the nature of a private contractual condition than an actual tax. 135 F. at 949. When viewed in this manner, *Buster* is consistent with the uncontestable observation that the tribes, as any other landowners, can contractually condition entry upon their land. However, the opinion of the Eighth Circuit referred to the Creek tribe in absolute terms as a nation, and thus broadly held that the tax was a legitimate exercise of sovereignty by the Creek Nation.

The Eighth Circuit subsequently broadened its sovereignty analysis in the 1956 decision of *Iron Crow, supra.* In that case, Thomas Iron Crow, an enrolled member of the Oglala Sioux Tribe who possessed allotted land in the Pine Ridge Reservation, leased some of his land in the Reservation for grazing purposes to a nonmember of the Oglala Sioux Tribe. The tribal council assessed a tax against Iron

Crow's lessee for the privilege of grazing stock on the land within the Reservation, thereby precipitating the lawsuit. Noting that the power to tax had never been formally divested by any affirmative act of Congress, the Eighth Circuit felt that the tribe retained this inherent aspect of sovereignty.

It should be noted that both of these Eighth Circuit decisions predate the recognition by this Court of limitations on tribal sovereign power arising from actions which are inconsistent with the tribes' dependent status or which conflict with an overriding federal interest. *See, Colville, supra; Oliphant, supra.* Therefore, reliance upon the Eighth Circuit's analysis is inappropriate.

A Supreme Court case that focused on aspects of this sovereignty question was *Morris v. Hitchcock, supra.* In *Morris,* the Chickasaw tribal council imposed an annual privilege or permit tax on livestock grazing within the Chickasaw Nation. The Supreme Court upheld this permit tax, not on sovereignty grounds, but rather under the general rubric of federal approval pursuant to treaty coupled with private property concepts. 194 U.S. at 389-393.

If the above opinions are characterized as merely condition of entry cases, no conflict with fundamental concepts is presented. Every private property owner can condition entry onto his land as a function of his proprietary rights. The Foundation does not contest the proprietary right of the tribes to attach contractual conditions upon the entry and use of their land. Nor is it contested that specific treaty provisions, such as found in *Morris,* may grant this type of power. However, when the tribes enact an ordinance which is purportedly a function of sovereign power, a different situation is created. Proprietary rights are typically exercised in a voluntary, contractual situation where each party is free to bargain with the other. Compliance with sovereign power, on the other hand, is mandatory. When this mandatory compliance is coupled with the lack of a voice

in that government, it is unjustly coercive. The concern of this *amicus* is the impact of amorphous concepts of inherent sovereignty over nonmembers of the tribe springing not from treaties or specific statutes, but rather from mere historical existence.

The concept of inherent sovereignty as an attribute of historical existence was recently addressed in *Washington v. Confederated Tribes of the Colville Indian Reservation, supra.* In *Colville,* a tribal tax upon cigarettes sold in reservation smoke shops was upheld even as it applied to nonmembers of the tribe. In the course of upholding this tax, the Court implied in broad dicta that any tribal taxation of nonmembers is proper as a fundamental attribute of sovereignty:

> The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status.
>
> . . . .
>
> Federal courts also have acknowledged tribal power to tax non-Indians entering the reservation to engage in economic activity. *Buster v. Wright,* 135 F. 947, 950 (CA8 1905), appeal dismissed, 203 U.S. 599 (1906); *Iron Crow v. Oglala Sioux Tribe,* 231 F.2d 89 (CA8 1956); cf. *Morris v. Hitchcock,* 194 U.S. 384, 393 (1904). No federal statute cited to us shows any congressional departure from this view. To the contrary, authority to tax the activities or property of non-Indians taking place or situated on Indian lands, in cases where the tribe has a significant interest in the subject matter, was very probably one of the tribal powers under "existing law" confirmed by § 16 of the Indian Reorganization Act of 1934, 48 Stat. 987, 25 U.S.C. § 476.

100 S. Ct. at 2081.

This expansive language concerning inherent sovereign powers contradicts the rationale of previous decisions which specifically rejected the exercise of tribal power over nonmembers of the tribe in certain instances. A clear example of this contradiction is found in the following language from *United States v. Wheeler*, 435 U.S. at 326, in which the Court addressed the power of a tribe to exercise criminal jurisdiction over its own members:

> *The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe.*
>
> . . . .
>
> These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations. *But the powers of self-government,* including the power to prescribe and enforce internal criminal laws, *are of a different type. They involve only the relations among members of a tribe.* Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status. (emphasis added).

Accord: Oliphant v. Suquamish Indian Tribe, 435 U.S. at 208-211. Although both *Oliphant* and *Wheeler* concerned issues of criminal jurisdiction as opposed to civil jurisdiction, it is indeed difficult to harmonize the Court's diametrically opposing discussions of tribal sovereignty over nonmembers on that basis alone. The same concerns of fundamental fairness are invoked in either situation.

Unfortunately, this Court's analysis in *Colville* is noticeably lacking in any discussion or apparent recognition of the potential ramifications resulting from the exercise of unfettered sovereignty over nonmembers of a tribe in

civil matters. The Tenth Circuit's opinion below not only expands the extent of tribal sovereignty over nonmembers, it also fails to recognize these concerns. Thus, this case provides an excellent opportunity for this Court to address these ramifications and to resolve the contradictions that do exist.

It is the position of this *amicus* that the precise delineation of tribal sovereignty is of utmost importance to this nation. Crucial to a well-reasoned delineation is consideration of the tension that exists between a sweeping grant of tribal sovereignty over nonmembers on the one hand, and the overriding federal interest in preserving basic conceptual foundations of our republic on the other. The remainder of this brief is devoted to an exploration of the fundamental conflicts which this tension creates.

II. THE CONCEPT OF REPRESENTATIVE GOVERNMENT PRECLUDES UNFETTERED TRIBAL JURISDICTION OVER NONMEMBERS OF THE TRIBE.

Representative government, as manifested through the right of suffrage, is a fundamental concept of our republic. The exercise of Indian tribal sovereignty over nonmembers who can have no voice in that government is the antithesis of this founding concept. The Foundation does not advocate nonmember participation in tribal government. Nevertheless, whenever the Indian tribes are accorded any measure of sovereign power over nonmembers, the issue of representative government is presented. Obviously, the extension of tribal sovereignty over nonmembers is more egregious in some circumstances than others. This case presents to the Court the situation of a tribal government exercising jurisdiction over nonmembers who have no voice in that tribal government, but who are suffering significant deprivation of their civil liberties. Therefore, this case clearly illustrates the potential for abuse.

The right of suffrage is integral to the concept of representative government. *See, e.g.*, U.S. Const. art. I, §§ 1, 2; U.S. Const. amend. XVII. No less than five amendments to the Constitution preserve this basic right of suffrage to *all* the people against any form of impairment. U.S. Const. amend. XV, XVII, XIX, XXIV, XXVI. In furtherance of this ideal, the Court has vigorously upheld this right against dilution or complete denial in both national and local elections. *E.g., City of Phoenix v. Kolodziejski,* 399 U.S. 204 (1970) (denial); *Hadley v. Junior College District of Metropolitan Kansas City,* 397 U.S. 50 (1970) (dilution); *Kramer v. Union Free School District,* 395 U.S. 621 (1969) (denial); *Avery v. Midland County,* 390 U.S. 474 (1968) (dilution); *Reynolds v. Sims,* 377 U.S. 533 (1964) (dilution). In holding that a congressional redistricting statute violated article I, section 2 of the Federal Constitution, this Court observed:

> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for a classification of people in a way that unnecessarily abridges this right.

Wesberry v. Sanders, 376 U.S. 1, 17-18 (1964). Indeed, the Court characterized this right in *Reynolds* as the "bedrock of our political system." 377 U.S. at 562. So fundamentally important is this right of suffrage that it triggers the strict scrutiny standard of equal protection analysis whenever the right to vote is diluted or denied. *Kramer v. Union Free School District,* 395 U.S. at 626.

Thus, it cannot be denied that having a voice in one's government is an overriding federal interest which permeates our entire society. According Indian tribes a measure of sovereignty over non-Indians, as did the Tenth

Circuit in the instant case, calls into question adherence to this fundamental principal of government by the consent of the governed.

The tribes are empowered to determine tribal membership for themselves. *See Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978); *Roff v. Burney,* 168 U.S. 218 (1897). As *Santa Clara Pueblo* illustrates, membership can be quite restrictive. 436 U.S. at 52 n.2. Thus, there exists the possible situation of a governmental entity exercising sovereign power over citizens who have no voice, and who often cannot obtain a voice, in that government.

In rebuttal to the argument that such a situation violates the fundamental precepts of our nation, one may assert that this is precisely the same situation as a state exercising jurisdiction over nonresidents. However, the analogy is faulty due to at least two crucial distinctions. First, this analogy elevates tribal government to a status in civil matters essentially equal to that of a state government. This is obviously improper as illustrated by this Court's opinion in *U.S. v. Kagama, supra.* Second, and more importantly, the nonresident, whatever his or her race, can easily have a voice in the state's government by merely establishing a bona fide residence in that state. Hence, the opportunity for having a voice in that government exists. There is no correlative opportunity for a nonmember in the tribal government situation.

Further exacerbating this situation of nonrepresentation is the lack of any effective judicial review of the challenged action. Indian tribes traditionally have been held to be immune from suit absent their consent. *Puyallup Tribe v. Washington Department of Game,* 433 U.S. 165 (1977); *United States v. United States Fidelity and Guaranty Co.,* 309 U.S. 506 (1940); *Turner v. United States,* 248 U.S. 354 (1919). Even though individual tribal officers are not immune from suit, *see Puyallup Tribe v.*

Washington Department of Game, supra; cf. *Ex Parte Young,* 209 U.S. 123 (1908) (suit against an individual state officer acting illegally held not barred by the state's sovereign immunity), it is submitted that this avenue is hardly a viable alternative for the following reasons.

If this Court affirms the Tenth Circuit's decision, a challenge to an ordinance on sovereignty grounds will be precluded. Nor is a federal forum available for a challenge on a fundamental civil liberties basis due to this Court's hesitancy to "interfere" with tribal self-government by entertaining civil suits based upon the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303 (1976). *Santa Clara Pueblo v. Martinez,* 436 U.S. at 64, 69-70. Therefore, a challenge to a tribal law would typically be brought in a tribal court. With no possibility of a voice in the workings of tribal government, a nonmember is truly an outsider in such a proceeding. A tremendous potential for abuse exists when a government is totally unaccountable to those it passes judgment upon. This potential for abuse is compounded by the lack of judicial review of the tribal decision in either a state or federal forum. Thus, a nonmember of the tribe could be without both effective grounds to challenge a tribal ordinance and an impartial forum.

This anomalous situation of having neither a voice in the government nor effective review of the governmental action cannot be harmonized with the founding principles of our nation by any maneuvering of jurisprudential logic. This Court stated in *Reynolds v. Sims* as to the question of whether Congress can authorize the states to circumvent strict adherence to the "one-man, one-vote" principle:

> Congress simply lacks the constitutional power to insulate States from attack with respect to alleged deprivations of individual constitutional rights.

377 U.S. at 582. Thus, neither the dominant sovereign, the United States, nor the lesser sovereigns, the individual

states, have the constitutional power to violate these fundamental principles. The oversight function of Congress and particularly this Court cannot be any less circumscribed as to an entity that is only quasi-sovereign. If this situation is approved, the Indian tribes cease to be lesser entities than the true sovereigns, and indeed become enclaves wielding potentially abusive and arbitrary power.

When a governmental entity exercises sovereignty over individuals having absolutely no voice in that government, it cannot be any less an "unwarranted intrusion on . . . personal liberty" than that found offensive in *Oliphant*. 435 U.S. at 210. The words of this Court in *Reynolds v. Sims* apply in the instant situation:

> [A] denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us.

377 U.S. at 566.

Not only does this case present an opportunity to consider the advisability in general of allowing the tribes to assert sovereignty over non-Indians, the ordinance at issue in the instant situation also calls into question the possible violation of yet another fundamental precept of our society: freedom of contract.

III. ALLOWING A TRIBE TO FUNDAMENTALLY CHANGE ITS VOLUNTARY OBLIGATIONS UNDER A CONTRACT THROUGH THE INSTITUTION OF A "TAX" VIOLATES FREEDOM OF CONTRACT

Petitioners to this action are engaged in the extraction of oil and gas from the Jicarilla Reservation pursuant to leases issued by the tribal council and approved by the Secretary of Interior. Many of these leases existed long before the enactment of the severance tax ordinance by the

Jicarilla Tribe. If this tax is upheld, it will drastically alter the petitioners' obligations under the leases in direct contravention to the agreement that there would be no additional costs or charges without the written consent of both parties. Further, the Tenth Circuit opinion below cursorily disposed of this issue by noting that such a provision is inapplicable to a sovereign's power of taxation. 617 F.2d at 549. Not only does this assertion reveal the mischaracterization of the tribe as a true sovereign by the Tenth Circuit, it also totally ignores the overriding federal interest in preserving the sanctity of contracts. For example, even the states as true sovereigns do not have unlimited power to alter contracts. U.S. Const. art. I, § 10, cl. 1.

Although not subject to the specific prohibitions of the Bill of Rights in the Federal Constitution, tribal governments are subject to similar limits on their power through Title I of the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. §§ 1301-1303 (1976). *Compare Talton v. Mayes,* 163 U.S. 376 (1896) and *Groundhog v. Keeler,* 442 F.2d 674 (10th Cir. 1971) *with Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978). By its terms the ICRA limits "all governmental powers" of a tribe and protects "any person" affected by the exercise of tribal powers. 25 U.S.C. §§ 1301(2), 1302 (3), (4), (6), (8) & (10); *see Oliphant v. Suquamish Indian Tribe,* 435 U.S. at 195 n.6; *Dodge v. Nakai,* 298 F. Supp. 17, 24-25 (D. Ariz. 1968) (extensive discussion of legislative history to interpret the phrase "any person" as including non-Indians). Of particular import to the instant case is the fact that tribal governments are prohibited from depriving "any person of liberty or property without due process of law." 25 U.S.C. § 1302(8).

In construing similar language in the fourteenth amendment, this Court held that the procedural safeguard of due process applies only to those interests properly encompassed in the terms liberty and property. *Board of Regents v. Roth,* 408 U.S. 564, 569 (1972). The "right to con-

tract" is a protectable liberty interest; *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923); while rights arising *from* contracts are protectable property interests, *Perry v. Sindermann,* 408 U.S. 593, 601 (1972). Thus by unilaterally changing a material provision of a mutually negotiated contract, the tribe has infringed a protectable liberty and property interest of the petitioners. It is precisely such arbitrary action of the tribe in interfering with property rights which the due process clause was designed to guard against. *Board of Regents v. Roth,* 408 U.S. at 577. Therefore, petitioners are entitled to due process of law before said interests are compromised.

However, obtaining adequate due process of law in this situation is difficult. As Judge Brimmer explained:

> [T]he concept of due process exists to protect the individual against arbitrary action by government, and the fundamental requisites of due process require that one have an opportunity to be heard at a meaningful time and in a *meaningful* manner. (emphasis added).

Berry v. Arapahoe and Shoshone Tribes, 420 F. Supp. 934, 944 (D. Wyo. 1976). Since *Santa Clara Pueblo* effectively precludes a federal forum for the type of due process violation alleged here, petitioners would be relegated to a tribal court to vindicate their claim. 436 U.S. at 72. Justice White noted that this remedy was not likely to be meaningful since "enforcement of these rights . . . [would] be left up to the very tribal authorities alleged to have violated them." *Santa Clara Pueblo,* 436 U.S. at 82 (White, J., dissenting); *see also* S. Brakel, *American Indian Tribal Courts The Costs of Separate Justice* (1978).

The Jicarilla Tribe's dispute over these and similar leases is a long-standing one. *See Jicarilla Apache Tribe v. Supron Energy Corp.,* 479 F.Supp. 536 (D.N.M. 1979). Neither party anticipated the drastic escalation in the price of oil and gas. In reliance on the terms of the lease, peti-

tioners invested substantial amounts of material and labor. Thus, it is manifestly unfair to allow the tribe to unilaterally change its obligation under these leases under the guise of taxation. Indeed, our entire economic system would grind to a halt if the sanctity of contracts was no longer guaranteed. This fundamental unfairness is compounded by the fact that petitioners have no voice in tribal affairs, nor do they have access to an effective forum in which to challenge this arbitrary action.

IV. ALLOWING THIS TYPE OF TRIBAL TAXATION IS INCONSISTENT WITH THE OVERRIDING FEDERAL INTEREST IN ESTABLISHING A NATIONAL ENERGY POLICY

As discussed earlier in this brief, tribal government power is limited not only by express congressional enactment, but also by overriding federal policies. *Oliphant, supra; Colville, supra.* Consequently, the Indian tribes lack the power to enact ordinances of the type in question since they could conflict with the attainment of the overriding federal interest in establishing a comprehensive energy policy.

The Arab Oil Embargo instituted by OPEC in the early 1970's highlighted this nation's dangerous dependence on imported oil. Congress responded with a variety of measures designed both to increase domestic production of fossil fuels and to encourage development of alternative forms of energy. *See* Energy Policy and Conservation Act, 42 U.S.C. §§ 6201-6214 (1976); Federal Nonnuclear Energy Research and Development Act of 1974, 42 U.S.C. §§ 5901-5917 (1976). These measures were supplemented by a renewed emphasis on conservation. *See* Energy Conservation Standards for New Buildings Act of 1976, 42 U.S.C. §§ 6831-6840 (1976); Energy Conservation in Existing Buildings Act of 1976, 42 U.S.C. §§ 6851-6892 (1976).

By 1977, Congress recognized that this country was facing a shortage of nonrenewable energy and, at the same time, was becoming increasingly dependent on foreign energy supplies. Department of Energy Organization Act, 42 U.S.C. § 7111 (1-2) (Supp. I 1977). Realizing that in the context of a fragmented approach to energy matters this disturbing trend constituted a threat to our national security, Congress mandated a comprehensive national energy policy to be implemented by the newly created Department of Energy. 42 U.S.C. § 7111 (Supp. I 1977).

Clearly, the establishment of a comprehensive long-range national energy policy is an overriding federal interest. Indeed, President Carter in his most recent State of the Union address noted:

> Our excessive dependence on foreign oil is a clear and present danger to our Nation's security.
>
> The need has never been more urgent. At long last, we must have a clear, comprehensive energy policy for the United States.

President Carter's State of the Union Address, January 23, 1980, *reprinted in* 1 U.S. Code Cong. & Ad. News 135 (March 1980). It is against this backdrop of an urgent federal interest in developing a comprehensive energy plan that the tribe's enactment in this case must be evaluated.

Indian tribes in this country control a significant amount of energy reserves. 1 American Indian Policy Review Commission Final Report 7, 338-339 (1977). As of 1977, forty separate tribal governments in seventeen different states controlled a portion of these reserves. *Id.* at 338. From a logistical standpoint alone, the evaluation and coordination effort needed to integrate forty separate regimes of energy-related taxation into a comprehensive national strategy is staggering.

In arguing the case below, the Secretary of Interior asserted that the tribes could use their purported sovereign

right to tax as a tool to restrict development of their reserves even under existing leases. Brief in Chief of the Secretary of Interior at 22-23, 27; *see also* 1 American Indian Policy Review Commission Final Report 179 (1977). Moreover, it is not speculative to assume that if the ordinance at issue in this case is upheld, other tribal governments will follow suit. *See Conoco, Inc. v. Shoshone and Arapahoe Tribes,* No. L. 80-0181 (D. Wyo., filed June 23, 1980) (Shoshone and Arapahoe Tribes' reassertion of their severance tax ordinance in reliance on the Tenth Circuit opinion below). Therefore, this Court must consider whether in light of these ramifications and the desire to establish a comprehensive energy plan, it is in the national interest to have forty separate enclaves that can not only tie up future development, but also stall existing production under previously negotitated leases by unilaterally increasing, in potentially unrestrained amounts, the cost of production.

CONCLUSION

Affirmance of the Tenth Circuit's opinion will extensively expand the nature and extent of inherent Indian tribal sovereignty over nonmembers of a tribe. Such an expansion contradicts the fundamental concept of representative government which forms the basis of our republic. The exercise of sovereignty over nonmembers who have no possibility of a voice in the tribal government is incompatible with any notion of fundamental fairness.

In addition, the ordinance in the instant case amounts to a unilateral modification of the preexisting leases between the parties. Not only is this modification in contravention of the express terms of the leases, said enactment also violates petitioners' liberty and property interests. Further, adequate due process of law is unavailable to petitioners because of the nature of tribal courts. Exacerbating this situation is the total lack of state or federal judicial review of a tribal court decision.

Finally, this Court must consider whether tribal ordinances of this type are consistent with the overriding federal interest in implementing a national energy policy.

It is crucial that this Court resolve the contradictions currently present in Indian law in a way that does not impair the validity of the fundamental concerns raised in this brief.

For the foregoing reasons, the ordinance in question should be struck down and the Tenth Circuit's opinion should be reversed.

Respectfully submitted this 20th day of November, 1980.

James G. Watt
William H. Mellor III
R. Norman Cramer Jr.
Mountain States Legal Foundation
1200 Lincoln, Suite 600
Denver, Colorado 80203
Telephone: (303) 861-0244
Attorneys for the Amicus Curiae

CERTIFICATE OF SERVICE

I, James G. Watt, one of the attorneys for the amicus curiae and a member of the bar of this court, certify that all parties required to be served have been served with the foregoing motion and brief; specifically that on November ...., 1980, I caused to be deposited in a United States Post Office at Denver, Colorado, with first class postage prepaid, three copies of the foregoing motion and brief of *amicus curiae* addressed to each of the following:

Robert J. Nordhaus
Attorney at Law
Nordhaus, Haltom & Taylor
200 Lomas Boulevard, N.W.
Suite 810
Albuquerque, New Mexico
87102

Wade H. McCree, Jr.
Solicitor General
Louis F. Claiborne
Deputy Solicitor General
Department of Justice
Washington, D.C. 20530

John R. Cooney
Attorney at Law
P.O. Box 2168
Albuquerque, New Mexico
87103

Jason W. Kellahin
Kellahin & Kellahin
P.O. Box 1769
Santa Fe, New Mexico 87501

Terry D. Farmer
Attorney at Law
Moses, Dunn, Beckley,
Espinosa & Tuthill
200 Lomas Boulevard, N.W.
Suite 800
Albuquerque, New Mexico
87102

Bruce D. Black
Attorney at Law
Campbell and Black
P.O. Box 2208
Santa Fe, New Mexico 87501

John H. Pickering
Attorney at Law
1666 K. Street, N.W.
Washington, D.C. 20006

James G. Watt

Subscribed and sworn before me this ..... day of November, 1980

Notary Public, City and County of
Denver, Colorado